IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 658

PACKARD MOTOR CAR COMPANY, A MICHIGAN CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION OF CARNEGIE-ILLINOIS STEEL CORPORATION, COLUMBIA STEEL COMPANY AND TENNESSEE COAL, IRON AND RAILROAD COMPANY FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF FOR AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CASES CITED.

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The undersigned, as counsel for Carnegie-Illinois Steel Corporation, Columbia Steel Company and Tennessee Coal, Iron and Railroad Company, respectfully move the Court for leave to file the accompanying brief in this case as *amici curiae* in support of the petitioner.

The issues involved in this case relate to the question whether the National Labor Relations Board has the

power to force manufacturing companies to bargain with union representatives of general foremen, foremen, assistant foremen, and other supervisory employees who are members of a unit certified by the Board. This question presents related questions which include, among others, whether general foremen, foremen, assistant foremen and other supervisory employees were intended by Congress to be included in the term "employees" as used in the National Labor Relations Act, and, also, the constitutional limitations upon the asserted powers of the Board in the exercise of its jurisdiction.

The three integrated steel producing companies presenting this motion, by their counsel, are vitally and immediately concerned with the questions which will be decided in this case. Complaints of alleged unfair labor practices involving foremen's unions have been filed with the Board by unions, or by the Board representing the unions, and are now pending against Carnegie-Illinois Steel Corporation and Columbia Steel Company. Petitions for representation of foremen's unions claiming to represent general foremen, foremen, assistant foremen and other supervisory employees have been filed before the Board and hearings have been concluded relating to Tennessee Coal, Iron and Railroad Company. These petitions are now awaiting decisions.

These Board cases present questions of law identical with some of the questions of law which will be decided in the case at bar. These Board cases also present questions which are not now before this Court. The rights of the steel producing companies in these Board cases will be determined in the case at bar as to the issues decided by this Court without an opportunity for hearing to them, unless they are permitted to file their brief and express their views as *amici curiae*.

Consent to file this brief has been received from the necessary parties, in accordance with Rule 27, paragraph 9.

Dated at Chicago, Illinois, this 2nd day of January, 1947.

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PRELIMINARY STATEMENT.

Carnegie-Illinois Steel Corporation manufactures steel, coke and coal chemicals. It employs approximately 100,000 persons. Its 20 plants are located in Pennsylvania, Ohio, Indiana and Illinois. Gary Sheet and Tin Mill is located at Gary, Indiana. Approximately 7,600 persons are employed there in the manufacture of tin plate and sheet steel.

Foreman's Association of America, Chapter 42, heretofore has filed its petition for certification of representatives involving the Gary Sheet and Tin Mill plant. A decision and direction of election was handed down by the Board on May 8, 1946. An election was held on June 6, 1946. Of the approximately 335 eligible voters, 280 cast valid votes, of which 55 were for Foreman's Association of America, Chapter 42, and 225 were against. The Board on June 21, 1946 entered its order dismissing the petition.

Gary Steel Works of Carnegie-Illinois Steel Corporation also is located at Gary, Indiana. It is a completely integrated steel plant, occupying approximately 1,400 acres and employing approximately 20,000 employees. The Gary Steel Works operates 15 batteries of coke ovens, manufacturing coke and coal chemicals, 12 blast furnaces, 50 open hearth furnaces, primary rolling mills and finishing mills.

On June 30, 1945, Foreman's Association of America, Chapter 44, filed its petition for certification of general foremen, assistant general foremen, turn foremen, assistant foremen and other supervisors at Gary Steel Works (N. L. R. B. Case No. 13-R-3174). This petition was withdrawn without prejudice on November 7, 1945. No petition for representation has been refiled.

On October 11, 1946 a complaint was issued by the Board on unfair labor charges filed by Chapter 44, Foreman's Association of America, against Gary Steel Works in N. L. R. B. Case No. 13-C-2799. Chapter 44 and the Board have completed presentation of testimony in this case. The respondent has not completed presentation of its testimony.

Columbia Steel Company operates open hearth furnaces, rolling mills, a sheet mill, a foundry, a wire and wire-rope mill at Pittsburg, California. There it employs approximately 2,500 persons. Foremen's and Supervisors' Association of Pittsburg, California has been certified by the

Board in N. L. R. B. Case 20-R-1396 pursuant to a decision and direction of election. A complaint against Columbia Steel Company alleging unfair labor practices and refusal to bargain has been issued by the Board in N. L. R. B. Case No. 20-C-1555. The hearing on this complaint has been held. The case is now awaiting Board decision.

The Tennessee Coal, Iron and Railroad Company (hereinafterwards referred to as "T. C. I.") is an integrated steel company manufacturing finished and some semi-finished products for sale. It produces substantially all of its raw materials to go into the manufacture of steel and not for sale to the general public. It employs approximately 28,000 employees.

For operational purposes it is divided into several divisions. The ore mining division employs some 4,600 employees and the rank and file of this division are represented by the International Union of Mine, Mill and Smelter Workers affiliated with the C. I. O.; the coal mining division employs approximately 4,100 employees and the rank and file of these employees are represented by the United Mine Workers of America affiliated with the American Federation of Labor; the rail transportation department employs approximately 1,100 employees, the rank and file of whom are represented by several labor unions, the Machinists Union affiliated with the American Federation of Labor, the United Steel Workers of America, the Brotherhood of Locomotive Enginemen and Firemen, and the United Association of Iron, Steel and Mine Workers; the manufacturing division employs approximately 16,600 employees, the rank and file of the maintenance and production employees in that entire division being represented by the United Steel Workers of America affiliated with the C. I. O.

The manufacturing division is composed of six plants;

namely, the Ensley Works, Fairfield Steel Works, Fairfield Wire Mill, Fairfield Tin Mill, Fairfield Sheet Mill, and the Bessemer Rolling Mill. The front line contact of management with the production and maintenance employees in the manufacturing division is the Turn Foreman or equivalent.

Petitions for representation involving T. C. I. have been filed in N. L. R. B. Case 10-R-2115 by "Fairfield Sheet Mill Supervisors Union" and in N. L. R. B. Case 10-R-2124 by "Tin Mill Supervisors Union."

Petitioners in both cases claim to be labor organizations separate and independent from each other and free of affiliation, association, or domination of any national union or any other labor organization. These two cases are now pending before the Board, awaiting decision.

All of the foregoing cases pending before the Board present questions of law identical with some of those involved in the case at bar. The decision of this Court will materially affect all of the cases pending before the Board.

ARGUMENT

I.

The History, Terms and Purposes of the National Labor Relations Act and the Necessity for Preserving Unity of Management Clearly Indicate That General Foremen, Foremen, Assistant Foremen and Other Supervisors Are Not Employees Within the Meaning of the Act.

A.

The Findings and Policy of Congress in Section 1 of the Act State That Its Provisions Relate to "Wage Rates," "Wage Earners" and "Workers." Such Findings and Congressional Policy Do Not Apply to Foremen, Who Are Part of Management and Act "in the Interest of an Employer, Directly or Indirectly."

The findings of Congress are stated in Section 1 of the Act:

> "The inequality of bargaining power between *employees* who do not possess full freedom of association * * * and employers * * * tends to aggravate recurrent business depressions, by depressing *wage rates* and the purchasing power of *wage earners* in industry and by preventing the stabilization of competitive *wage rates* and working conditions within and between industries." [Emphasis added.]

The policy of Congress is stated in Section 1 of the Act:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise *by workers* of full freedom of association, self-organization, and designation of representatives of

their own choosing, for the purpose of negotiating the terms and conditions of *their employment* or other mutual aid or protection." [Emphasis added.]

Congress stated in its *findings* and *policy* that it was concerned solely with "wage rates," "wage earners," and "workers." Congress used these words to express their common and accepted meaning. "*Wages* and *hire* are for the more menial, manual or mechanical forms of work, and commonly imply employment for short periods as a day or week; *salary* and *stipend* are for the more mental forms and imply greater permanence of employment and payment at longer intervals: the *wages* of a servant or a laborer; the *salary* of a post-master or a teacher." (Century Dictionary.) "In common use the word *wages* is applied specifically to the payment made for menial labor or other labor of a manual or mechanical kind. * * *" (Century Dictionary.)

A supervisory foreman with authority to hire and discharge employees is not a "workman" or "wage earner" within the meaning of the Bankruptcy Act (11 U. S. C. A., Sec. 104 (b) (5)). Hence foremen were not entitled to priority to claims for *wages* due. *In re Broudarge Brothers Novelty Yarn, Inc.*, 22 F. Supp. 891, (E. D. N. Y., 1938).

The Committee Reports on the National Labor Relations Act before it became a law clearly indicate the intent of Congress not to extend the provisions of the Act to general foremen, foremen, assistant foremen and other supervisors who are members of management. The Senate Report of the Committee on Education and Labor (issued May 1, 1935; Congressional Reports, National Labor Relations Act, S1958, 74th Congress, First Session, Calendar No. 595, Report No. 573) on page 3 stated:

"For these reasons, the committee believes that the present bill, by promoting peace in industry, will con-

fer mutual benefits upon employers, *workers*,[1] and the general public.

"(2) *Economic adjustment.*—The second major objective of the bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract. The relative weakness of the isolated *wage earner*[1] caught in the complex of modern industrialism has become such a commonplace of our economic literature and political vocabulary that it needs no exposition. * * *"

The same Senate Committee on pages 6 and 7 of its Report stated:

"* * * And to hold that a *worker* who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby.

"For administrative reasons, the committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse. But after deliberation, the committee decided not to exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work. Section 7 (a) imposes no such limitation. And in cases where the organization of *workers* is along craft or industrial lines, very large associations of workers fraught with great public significance may exist, although all the members therein work in very small establishments. * * *"

Other excerpts from the same Senate Committee Report follow:

"* * * Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is *specific* in its terms. *Neither the*

1. Emphasis added in all quotations from Committee Reports.

National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair. Secondly, as will be shown directly, the unfair labor practices listed in this bill are supported by a wealth of precedent in prior Federal law.

* * * * * * *

"In conjunction with section 7, the first unfair labor practice enumerated in section 8 makes it illegal for an employer—

> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"This familiar statement calls to mind the language of section 7 (a) of the National Industrial Recovery Act (48 Stat. 198, U. S. C., title 15, sec. 707 (a)), which provides that—

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of *employers* of labor, *or their agents*, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

"Similarly, section 2 of the Railway Labor Act of 1934 (48 Stat. 1185) provides:

> The purposes of the act are * * * (3) to provide for the complete independence of carriers and of employees in the matter of self-organization * * *. Employees shall have the right to organize and bargain collectively through representatives of their own choosing * * *. *No carrier, its officers or agents*, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organizations of their choice * * *." (pp. 8, 9)

"The so-called 'company-union' features of the bill are designed to prevent interference by employers with organizations of their *workers* that serve or might

serve as collective bargaining agencies. * * *" (p. 10)

"Of course, nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. * * *" (p. 11)

"* * * *Workers* have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. * * *" (p. 13)

The Report of the House Committee on Labor (issued June 10, 1935, 74th Congress, First Session, Report No. 1147) on page 3 stated:

"* * * But the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern. * * *

"Upon the passage of the National Industrial Recovery Act it was hailed by the President as giving to *workers* 'a new charter of rights long sought and hitherto denied.' * * *"

Additional excerpts from the House Committee Report follow:

"*Section 1* states the *underlying factual basis* for the regulation provided in the bill. * * *

"The loss in *wages*, trade, and commerce from such strife has been enormous, as competent investigation demonstrates. * * *" (p. 8)

"* * * The absence of effective enforcement and election machinery, and the diffusion of responsibility and conflicting interpretations in regard to section (7) (a), have forced *workers* to resort to industrial warfare to gain the rights which by law were justly theirs. Throughout the period of the operation of the National Industrial Recovery Act, there existed or were impending serious conflicts burdening or threatening to burden the free flow of commerce in some of our largest industries, such as coal and copper mining, textile manufacturing, steel, automobiles, rubber, and

shipping. These conflicts have had their counterpart in other industries as well, on perhaps a smaller scale, but equally bitter and fraught with dangerous possibilities.

"The bill seeks, to borrow a phrase of the United States Supreme Court, 'to make the appropriate collective action (of employees) an instrument of peace rather than of strife' (*Texas & New Orleans R. R. Co. v. Brotherhood* (281 U. S. 548)).

"The committee amendment to this section reformulates the declaration of policy in order to emphasize the intent of the bill to promote industrial peace, and therefore to bring it more clearly outside of the ruling in the *Schechter* case. * * *" (p. 9)

"In section 2 are listed various definitions of terms. These definitions are for the most part self-explanatory. * * *

"This statement is a sufficient answer to those who, with questionable disinterestedness, proclaim that rugged individualism is the great boon of the American workman; or that there is something 'un-American' in a movement by *workers* to pool their economic strength in a type of labor organization most effective in approximating the economic power of their *employers*, namely, in so-called 'outside unions,' thereby establishing that 'equality of position between the parties in which liberty of contract begins.' While the bill does not require organization along such lines, and indeed makes no distinction between such organizations and others limited by the free choice of the *workers* to the boundaries of a particular plant or *employer*, it is imperative that *employees* be permitted so to organize, and that unfair labor practices taking in *workers* and labor organizations beyond the scope of a single plant be regarded as within the purview of the bill." (pp. 9, 10)

"The committee amendment to subsection 6 narrows the definition of interstate commerce by not making it extend to transportation or communication that is merely 'related to' interstate commerce. This change has been made in view of the doubts that the *Schechter*

case casts upon the validity of regulating practices that are merely 'related to' or 'indirectly' interstate commerce.

"The new definition inserted by the committee amendment to subsection 7 also helps to confine the bill to the proper sphere under the *Schechter* decision by removing from its purview practices which merely 'affect' interstate commerce. Under this amendment the bill is confined to practices 'burdening or obstructing' interstate commerce. These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction." (p. 10)

"* * * There cannot be two or more basic agreements applicable to *workers* in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

"It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. * * *" (p. 20)

"* * * *Employer*-promoted unions are most prevalent in the larger plants and industries, where the bargaining power of the individual *worker* is very weak, and, curiously enough, where the managements have hitherto been opposed to organization of their *workers*. * * *" (p. 17)

"The form and nature of the Board's order will of course be subject to court review, along with the other determinations and actions of the Board in the case,

both as to the facts and *the law*, in the manner provided in subsection (e) or (f)." (p. 24)

"* * * The Board is to be solely a quasi-judicial body with *clearly defined* and *limited powers*. *Its policies are marked out precisely by the law.* * * *" (p. 26)

Notwithstanding these clear expressions of Congressional intent in the Committee Reports, the majority opinion of the Board (R. III, p. 1794) stated:

"* * * In stating the purpose of the statute in Section 1 and in defining the term 'employee' in Section 2, Congress used broad language and there is nothing in that language or in the *legislative history* of the Act which in our opinion would justify our construing it in the narrow and restrictive manner which the Company is urging. * * *" [Emphasis added.]

However, the minority opinion of the Board (R. III. p. 1823, footnote 4) states:

"There is some attempt in the majority opinion to claim that the result reached conforms to the intent of Congress. In view of the fact that supervisors were never mentioned either in committee or on the floor at the time of the passage of the Wagner Act, I have never regarded such arguments as particularly fruitful, especially as the definition of 'employee,' unlike that contained in the Railway Labor Act, does not specifically include 'subordinate officials.' The real truth of the matter seems to be that Congress scarcely adverted to the question until the repercussions of the *Union Collieries* decision invited the attention of the House. Then a bill to amend the Act so as to exclude supervisors from its provisions, gathered considerable legislative momentum in the House Military Affairs Committee. Before the bill was reported out, however, the *Maryland Drydock* decision was issued."

This Court in *N.L.R.B.* v. *Hearst Publications*, 322 U. S. 111, at page 124 stated:

"Whether, given the intended national uniformity, the term 'employee' includes such *workers* [Emphasis added] as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning * * *.' Rather 'it takes color from its surroundings * * * [in] the statute where it appears,' *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 545, 60 S. Ct. 1059, 1065, 84 L. Ed. 1345, and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' * * *"

The House Committee Report stated (p. 8) that Section 1 of the Act provides "the underlying factual basis" for the regulation provided in the bill. The findings of fact of the Board regarding the foremen of the Petitioner cannot be substituted as "the underlying factual basis" for forcing the Petitioner to make a labor contract if the will of Congress is to be obeyed. *Yakus* v. *United States*, 321 U. S. 414, 424.

Conferring benefits on "workers" and the "isolated wage earner" was declared by the Senate Committee Report (p. 3) to be "the second major objective" of the Act. Congress and the various Committees considering the Act's provisions well knew the difference in meaning and in economic effect between "workers" or "wage earners" and foremen or supervisors. Notwithstanding, there is no provision in the "clearly defined" and "limited powers" given to the Board by the Act relating to foremen or other supervisors. To read such a provision into the Act is merely going contrary to the legislative intent by supplying a provision which Congress deliberately omitted.

The House Committee Report further stated (p. 9) that Section 2 of the Act, describing "employer" and "employee," contains "definitions which are for the most part

self-explanatory." This clearly indicates an intention of Congress to limit "employee" as used in the Act to "worker" and "wage earner" referred to in Section 1 of the Act and to limit the Board from extending the term to other concepts, as it has done in extending it to Petitioner's foremen.

The "serious conflicts" among *"workers"* existing *"throughout the period of the operation of the National Industrial Recovery Act"* in "some of our largest industries," including "steel" and "automobiles," was the basis for reformulating the declaration of policy in Section 1 of the Act *"in order to emphasize the intent of the bill,"* according to the House Committee Report (p. 9)

These "serious conflicts" during the period stated did *not* exist in either the "automobile" or "steel" industry with respect to general foremen, foremen and other supervisory employees. There has never been any such "conflict" in the "automobile" industry until about the time of the case at bar. There is no history of collective bargaining in the steel industry by representatives of foremen and other supervisory employees, and no attempted collective bargaining since the passage of the Act. To force collective bargaining upon employers in these industries now would ignore the "intent" of the Act which Congress sought to "emphasize"—an intent that the Act be applied to "workers" and "wage earners" in industry because of the "serious conflicts" during the period of the operation of the NIRA and no "intent" that the Act be applied to foremen and other supervisors. The argument that some unions have a history of bargaining collectively for some foremen is no basis for finding the Board was given *power by Congress* to *force* collective bargaining upon *all* foremen in *all* industry.

It is important to note that the House Committee Report (p. 26) considered that the powers given to the Board

were "clearly defined" and "limited powers." The Board's theory is contrary. The Board considers the question to be whether it "could properly find" that Petitioner's foremen are employees within the meaning of the Act rather than whether *the power to compel* the execution of a labor agreement with union representatives of Petitioner's foremen is a power which was "clearly defined" and one of the "limited powers" given to it by Congress. Thus, the Board proceeds to "interpret" the Act and issue its "findings of fact," *conferring upon itself powers never granted to it by Congress.*

Even the Circuit Court of Appeals misstates the problem, *N. L. R. B.* v. *Packard Motor Car Co.*, 157 F. 2d 80, 83, by stating that the "controlling questions" are whether the supervisory employees are "entitled" to or "excluded" from "the privileges" of the Act, and, if they are entitled to "the privileges" of the Act, whether the unit created by the Board is appropriate. Stating the problem in this manner begs the question. It ignores the fundamental question whether the *power* to exercise jurisdiction was ever given by Congress to the Board in the first place. As the dissenting opinion rightly observed (p. 87), we are not concerned with "the making of a policy" or what the policy of Congress ought to be or should have been. The only references to Congressional Reports to ascertain the intent of Congress are in the dissenting opinion. (157 F. 2d 80, 87.) The majority opinion (p. 84) merely stated, "The legislative history does not assist in the solution of the problem."

It is important to note, also, that the House Committee Report stated (p. 26) that the Board's "policies are marked out precisely by the law." The *policies* given to the Board by Congress are set forth in Section 1 of the Act. The *limitations* of the *policy* to "workers" and "wage earners"

and the frequent reference to them in both the Senate and House Committee Reports, together with other provisions of those Reports hereinbefore quoted, clearly indicate an intention of Congress to *limit* the powers of the Board to "workers" and "wage earners" and to exclude the Board from the exercise of any such powers with reference to foremen and supervisors.

B.

The Board's Order, if Enforced, Will Destroy Management Unity and Will Take Away From Management the Authority It Must Retain in Exercising Its Duties and Responsibilities.

Management includes all levels of managerial and supervisory personnel and is not confined to top-ranking executive and administrative officials.

Both the Board and the Circuit Court of Appeals admitted that foremen are members of management unity. The Circuit Court stated (157 F. 2d, 80, 81) "The foremen are the front line of management." Similar statements and quotations are repeated in the Court's opinion.

A bona fide foreman is engaged exclusively in the performance of management functions. He directs the working forces of a unit and has direct responsibility for the facilities and operations of that unit. He performs no work of the same nature as that of the employees supervised, except for training purposes and in emergencies. He is the front line of management and upon him rests responsibility for direct execution of management functions in his particular area. In meeting his responsibility, the foreman exercises independent judgment and decision daily in the arrangement of working forces, operation and maintenance of manufacturing facilities, safety, personnel, and labor relations. He initiates orders for such items of cost as materials, tools, equipment, services, fuel and labor. Because

of his close daily association and experience, the foreman possesses a more detailed knowledge of his particular facilities, processes and personnel than other members of the management. Such knowledge is an integral part of the management function and is called upon constantly not only by the foreman himself, but also by other members of management. No policy, plan or procedure can be translated into action except through each foreman, who constitutes the only "management" existing in his sphere of responsibility.

No individuals or areas of management in a modern business can, as a practical matter, exercise independent action without the consultation, collaboration and cooperation so essential to effective execution of management functions and responsibilities as a whole. The management objective can be attained only through unrestricted collaborative effort and teamwork of all those exclusively concerned with its inherent functions and responsibilities, whether they be line or staff, and regardless of their position in the management structure.

It is common knowledge that effective conduct of the business is dependent upon complete collaboration of all members of management in the discharge of these functions and responsibilities, and that management must perform as a team with a single dominant purpose. The management team must have the authority necessary for the performance of its complete responsibility in the complex and ramified operation of the plant as a unit; otherwise it does not perform effectively. The management unity cannot be divided without destroying that coordination of team effort, timing, scheduling and flow of production so essential to the successful conduct of the business. The unionization of any part of management, with its inherent creation of dual obligations, destroys the team and the team work with all that it connotes.

It is idle to suppose that organized foremen can be "uncontrolled" agents in dealing with the "rank and file" or in performing duties as a part of plant management. Organized foremen in union plants have been—and, it is reasonable to assume, always will be—influenced by the actions and policies of the rank and file union representatives. The public press accounts of the strikes in 1946 furnish ample proof of organized foremen placing union ideology above their duties as a part of management. Under policies of the Foreman's Association of America, foremen were,—and probably always will be—"controlled" by the union.

The American system of industrial production cannot exist where direction of the working forces is half management and half union. Destruction of essential unity of management and the efficiency and economy of operations is bound to result.

Authority cannot be divided and the management responsibility fulfilled. The authority of plant management to manage and its responsibility to the owners and—in any careful analysis—to the public, should not be transferred to a foremen's union. Creation of monopolistic power in a union as to its members, the employer, and the owners is the direct antithesis of unity in management and the American system of industrial production.

It may be suggested that the foreman's work is of such a character that there is little difference between his work and that of a top paid production worker. Quite the contrary is true. There is present in the foreman's work the fundamental of management or supervision. Without the execution of this responsibility the production machine falters. Production is not a spontaneous thing. It needs direction at every turn. This direction is supplied by foremen and other members of management. The level at which direction and supervision occur in any business en-

terprise is not a criterion of their necessity. It is rather only an indication of the type or scope of supervision given by that particular rank of management. Each level of supervision is a necessary step in the management of the business; otherwise that level would not exist.

The "facts involved in the economic relationship" require that the present American system of industrial production be retained, at least until Congress constitutionally devises a different system. The American system cannot be retained if a foremen's union is forced upon employers by the Board and is permitted to inject itself into management and to dictate, without any responsibility, its own ideas about plant operations.

There is nothing in the Act, or its legislative history, which indicates an intent by Congress to change the industrial system of production, to divide management, and to make one segment of management recognize and bargain with another. The Board should not be permitted to conduct an experiment so ill conceived and so productive of disruption and disunity.

By the very nature of his work the foreman occupies a position of trust and confidence. He has been selected because of individual capabilities and special qualifications; and the terms and conditions of his employment are fixed accordingly. The foreman is and must be capable of looking out for his own best interests; if not, he does not meet the qualifications for the management function. In his position as a part of management, the intervention of a bargaining agent is unnecessary.

II.

The Hearst Publications Case Is No Authority For the Enforcement of the Board's Order.

The case of *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, was relied upon by the Board in its decision (R. III, p. 1795) and also by the Circuit Court of Appeals in its opinion (157 F. 2d 80, 85). The *Hearst* case affirmed the decision of the Board that newsboys are employees and are entitled to collective bargaining rights granted by the Act. It is not authority for the decision of the Board in the case at bar for the reasons heretofore stated in this brief and as will be shown by further analysis.

The Board in its Decision and Direction of Election (R. III, 1791-18) seeks justification for its self-created power by the dictum: "Where all the conditions of the relation require protection, protection ought to be given." *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 130.

What is there for the Board to protect? What are *all* of the conditions of the relation which require protection?

The employer receives no protection by the Board's edicts. In fact, protection is taken away from the employer. Management unity is destroyed. Divided loyalty of foremen will create more "serious conflicts" than those now existing.

The public receives no protection. It receives the greatest *injury*. The public, that is, the consumers, lose the benefit of production under unified management, a major source of American superiority in the manufacture and distribution of every day necessities.

The production workers' union is protected by the Board and the courts, as any employer and the public well know.

The foremen themselves do not require the protection of the Board. The fact that they have been able to attain such position of trust, generally by promotion from the ranks, is proof of that. The entire success of the enterprise depends upon the company itself protecting its managers.

The major question presented is not "one of specific application of a broad statutory term"—the term "employer" or "employee." The question presented, first, is one of *a claimed power which is challenged.* The question presented, secondly, is where to draw the line of employer in the application of an Act passed by Congress for the benefit of "laborers" and "workers." (157 F. 2d 80, 87.)

Where the challenged power of the Board goes to the scope of the Board's jurisdiction, then that challenge should be considered by this Court as any other such question arising in the first instance in a *judicial* proceeding or as a question of the jurisdiction of this Court arising in an intended judicial review by this Court of a lower court's adjudication.

The existence of an asserted finding of fact *per se*, a "reasonable construction," a "warrant in the record," a "reasonable basis in law" or a "rational conclusion" is not enough. *This Court's function is not so limited.* When the question is one of power to exercise jurisdiction or the constitutionality of the power exercised, this Court must go on and examine the sources of the power and adjudicate *whether Congress has ever given it to the Board.* When the "history, terms and purposes of the legislation" do not indicate a grant of the power asserted, the power is lacking. It is then the plain duty of this Court, imposed by the Constitution, to strike down the expropriation of such power.

"• • • The order of the Board is subject to review by the designated court, and only when sustained by

> the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right of statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. * * *" *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1.

There *is* something in the Act to indicate a result contrary to the decisions of the Board and the Circuit Court of Appeals in this case. That something is clearly set forth in the Senate and House Committee Reports, the findings and policy of Congress as stated in Section 1 of the Act and the reference to "employer" and "employee" in Section 2 (2), (3) of the Act. Congress expressed an intention to draw the line between employee and employer. Congress expressly intended that the provisions of the Act shall apply to the former but not to the latter. The question of law is: Where shall the line be drawn?

The line of the Board's constitutional power should be drawn where the Board heretofore has drawn it for the purpose of determining whether a union of production workers is company (foremen) dominated or whether unfair labor practices of foremen with respect to a union of production workers have made liable the employer to the punitive edicts of the Board. (*Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80, 81; *Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520.) The drawing of that line by the Board uniformly has been where management ends and when production begins. That line at Packard, in the steel producing industry and in industry generally is at the position of turn foreman or its equivalent. All positions on that line and above constitute management—the "employer."

With respect to these positions, the Board has no power from Congress to exercise its jurisdiction. Any attempted exercise of such jurisdiction is a usurpation of a power which was never given to the Board by Congress. The Board's position is not logically sound. It is not consistent with economic facts or the *"limited" powers conferred upon it by Congress.*

There is no basic reason for Board inconsistency in the drawing of this line. The impelling reasons which caused the Board to draw the line at the foreman level in complaint cases should apply to the Board in representation cases and in the case at bar. For the Board to apply a meandering line—depending on the exigencies of the case and the particular union or individuals involved—and a devious method of reasoning, as it has in the case at bar, results in decisions which are not only logically inconsistent but also which are arbitrary and discriminatory against employers.

This is the first fallacy in the Board's case!

The drawing of the line of necessity is by the Board in the first instance. Does that make any Board's decision a finding of fact? And the same as any other finding of fact? And conclusive? It does not. This is the second fallacy of the Board's case!

May the Board confer (legislative) power upon itself to exercise its jurisdiction regarding foremen? The Board cannot constitutionally create such power. Only Congress can create such power. Congress has not done so. It has expressly called upon the Board to draw the line and to exercise its jurisdiction only with respect to persons below the line. The claim of the Board in the case at bar that it can create its own legislative power and thereby determine the limits of its jurisdiction ignores the constitutional limits upon legislative power. Legislative power is non-

delegable. This is the third fallacy of the Board's reasoning!

Having exercised its asserted jurisdiction—which initially the Board said (*Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733) it lacked power to exercise—is this Court precluded from making a judicial examination of the claimed power? That this Court is not so precluded is the fourth fallacy of the Board's reasoning!

The mere assertion of a legislative or judicial power by the Board does not make such assertion a finding of fact immune from challenge by an employer or the scrutiny of this Court. The so-called finding of fact with respect to Packard foremen is a finding of fact which relates to the *power of the Board.* If the Board has power to exercise its jurisdiction merely by finding as a fact that it has such power, if such finding is conclusive, and if the Board thereby can exclude judicial examination of the question, judicial review, as in the case at bar, is merely a ritual and not an adjudication, which it should be, especially, as the case at bar, when the power is challenged.

The principles of organization applicable to the Petitioner have been detailed by the Board and by the Circuit Court of Appeals. The same principles are applicable to the steel producing industry.

Unity of management is essential in the varied operations of an automobile plant, a steel plant, or any industrial plant. Foremen have concomitant duties and responsibilities with other members of management. They direct operations and hold positions of trust. In the steel industry, as in many industries, foremen keep the time of the production and maintenance employees under their supervision and report "time worked" to the accounting department for the computation of pay checks. In the current new litigation under the Wage and Hour Act, foremen will

be important witnesses pertaining to time worked—and time not worked.

> "And Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens. And they judged the people at all seasons: *the hard causes they brought unto Moses, but every small matter they judged themselves.*"
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> —Exodus XVIII: 25, 26.

"Organization is as old as human society itself."[2]

III.

The Constitutional Limitations on the Board's Power Should Prevent Enforcement of the Board's Order.

If "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law", as stated in the *Hearst* case (p. 131), the intent of Congress will be disregarded. Congress intended that the Board have "clearly defined and limited powers".

Furthermore, the questioned jurisdiction of the Board and the constitutional limits upon the Board's power should not be decided by the Board itself. There should be a judicial determination. *Crowell* v. *Benson*, 285 U. S. 22.

Congress lacks constitutional power to delegate to the Board authority to legislate that employers are compelled to bargain with themselves. As found by the Circuit Court of Appeals in this case, "foremen are the front line of management" and, hence, are employers under the Act. Furthermore, Congress lacks constitutional power to delegate to the Board the authority to make laws.

Schechter v. *United States*, 295 U. S. 500.
Carter v. *Carter Coal Company*, 298 U. S. 238, 310.
Yakus v. *United States*, 321 U. S. 414, 424.

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2. "The Principles of Organization" by James D. Mooney and Alan C. Reiley. Harper & Brothers.

Congress must express a standard for the Board to follow in order that the Board's orders may comply with the will of Congress. There is no such standard in the Act. Since Congress has not stated a standard for the guidance of the Board with respect to foremen and other supervisors, the Board may not proceed to establish its own legislative standard. This the constitution prohibits.

The present chairman of the Board testified regarding the case at bar on February 28, 1946 before the Subcommittee of the Committee on Education and Labor of the United States Senate as follows:

> "* * * I speak for both my colleagues in saying that all three of us regard this matter as one involving a broad question of national policy on which we, as a Board, having already expressed our views judicially, and having the matter pending before us in other regards, ought not to advise the Congress which particular course to follow." (Report of Proceedings, Vol. 7, p. 553.)

There is no constitutional authority for the Board by a judicial determination to settle broad questions of national policy. The determination of "a broad question of national policy" should be made by Congress and not by the Board.

Conclusion.

The enforcement of the Board's order in this case will impair, and may even revolutionize the American system of industrial production. There is nothing in the Act or its legislative history expressing such an intention by Congress. The Board has not been authorized by Congress to change the economy of the United States and may not constitutionally do so. The enforcement of the Board's order should be denied by this Court.

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